LIM HONG SIANG

v.

PP

HIGH COURT MALAYA, ALOR STAR
ZAMANI A RAHIM JC
[CRIMINAL APPEAL NO: 41-15-2007]
29 APRIL 2008

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Accused charged under s. 411 Penal Code with offence of retaining stolen property - Plea of guilty - Whether statement of facts supported charge against accused - Whether plea of guilty ought to be substituted with one of not guilty*

CRIMINAL PROCEDURE: *Statements - Statement of facts - Whether supported charge under s. 411 Penal Code of retaining stolen property against accused - Duty of magistrate to verify facts of case with charge - Concise and relevant facts to support elements of charge*

The accused, who was charged under s. 411 of the Penal Code ('Code') with the offence of retaining stolen property, admitted to the facts in the statement of facts presented by the prosecutor. The court accordingly accepted the accused's plea of guilty and convicted him. In mitigation, the accused requested that he be imposed with a fine only. The prosecutor, on the other hand, requested for a deterrent sentence since cases of this nature were rampant. The court sentenced the accused to three months imprisonment. The accused, feeling dissatisfied, appealed against the sentence.

Held (remitting the case back to the Magistrate Court for retrial):

(1) Upon careful perusal, the facts disclosed in the statement of facts did not support the charge against the accused. Further, the third paragraph of the statement of facts was inconsistent with the charge against the accused under s. 411 of the Code and the allegation therein that the accused had committed armed robbery should be excluded. The Magistrate was duty-bound to verify the facts of the case with the charge to ensure that the facts were supportive of the charge and having

done so, to expunge all inadmissible, irrelevant and highly prejudicial evidence against the accused, more so in this case where the accused was unrepresented. The statement of facts should be concise, unambiguous and contain relevant facts that go to support the elements of the charge. Even though the appeal was against sentence only, the discretionary powers of revision under s. 325 of the Criminal Procedure Code available to this court ought to be exercised to substitute the plea of guilty of the accused with one of not guilty. (paras 9, 10, 11, 12, 13, 14, 15, 16, 17 & 18)

Case(s) referred to:
Kiew Foo Mui & Ors v. PP [1996] 1 CLJ 14 SC ***(refd)***
Saludin Surif v. PP [1997] 3 CLJ 529 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 325
Penal Code, ss. 392, 397, 411

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, 25th edn, para 16, p 2119

For the petitioner - Gooi Hock Seng; M/s Shan & Gooi
For the respondent - Siti Maslia Ibrahim DPP

Reported by Suresh Nathan

JUDGMENT

Zamani A Rahim JC:

[1] This is a simple case. Despite its simplicity, there are flaws in the prosecution case. The flaws herein are common occurrence in the court below. With this judgment, I hope it will serve as a reminder to the prosecution so that similar mistakes may not be repeated.

[2] For the purposes of this appeal, the appellant is hereinafter referred to as the accused. The accused was charged at the Magistrate's Courts (2) Alor Star as follows:

The Charge

Bahawa kamu pada 19.11.05 jam lebih kurang 5.00 petang di dalam kedai J.J. Star Trading, No. 1406, Taman Sultan Badlishah, Alor Star, di Daerah Kota Star, di dalam negeri Kedah, dengan niat yang curang telah memiliki harta curi iaitu 5 buah telefon bimbit (3 jenis jenama Nokia, 1 jenama Motorola dan 1 jenama Samsung) dengan harga setiap satu lebih kurang RM70 kepunyaan Fong Chew Phein, KPT: 831003-07-5612, di mana kamu tahu atau ada sebab mempercayai harta itu adalah harta curi. Oleh yang demikian itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 411 Kanun Keseksaan.

[3] The charge was read and explained to the accused. He understood the charge and consequences of his plea. He pleaded guilty thereto. As the accused was unrepresented, it would be desirable that the accused be informed of the range of sentences that can be meted out against him.

Facts Of Case

[4] Having pleaded guilty and understood the nature and consequences of his plea, the prosecutor presented the statement of facts of the case. The facts were as follows:

Pada 19.11.06, jam lebih kurang 1212 hrs, semasa pengadu sedang bertugas sebagai pegawai bertugas di Pusat Kawalan IPD Kota Star telah terima satu panggilan telefon dari seorang lelaki cina nama: Poh Ken Hua, KPT: 800503-02-5345 mengatakan kedainya bernama Soji Telekomunikasi, Lorong Merpati, Alor Star telah disamun oleh dua orang bersenjata pisau dan mengambil wang tunai RM100.00, satu lap top dan handset, kedua-dua suspek melarikan diri dengan menaiki m/sikal no. pendaftaran tidak dapat dipastikan cuma nombor 873 saja. Ini laporan pengadu.

Berpandu suspek 1. Lim Kim Lee, K/P: 601002-02-5003 dan Teoh Lai Sieng, K/P: 770512-02-6249 bersangkut Alor Star rpt: 20388/2006 pada 21.11.06 jam lebih kurang 1800 hrs diketuai Insp. Norzila bersama D/SI Maidin, D/L/Kpl. Maidin, D/L/Kpl. 90742, 116407, 118158 telah pergi ke kedai J.J. Star Trading, No. 1406 Taman Sultan Badlishah, 05050 Alor Star telah memperkenalkan diri pegawai polis kepada satu lelaki cina dan minta kad pengenalan diri dapati nama: Lim Hong Siang, K/P: 761211-02-6275, kerja berniaga, alamat: Kg. Charok Padang, 08200, Sik, Kedah @ A-146, Taman Aman, Anak Bukit, Alor Star, Kedah. Dengan diiringi oleh tuan punya kedai telah rampas

A 5 buah h/phone jenama seperti di bawah dan 5 helai resit belian atas nama Teoh Lai Seng, K/P: 770512-02-6249, 4 keping dan atas nama Lim Kim Lee, K/P: 601002-02-5003 sekeping dan Nokia 2300 1 buah Nokia 3610 1 buah, Nokia 3100 1 buah, Samsung SGH E 800 1 buah Motorolla C-380 1 buah. Lelaki
B cina tersebut ditangkap untuk siasatan lanjut bersangkut Alor Star Rpt: 20388/2006 satu senarai bongkar telah diserahkan kepada suspek sebab-sebab tangkapan telah diberitahu kepada suspek. Report sebagaimana Alor Star/20564/06.

Siasatan lanjut telah dijalankan ke atas lelaki cina yang ditangkap,
C yang mana telah dicamkan sebagai Yang Kena Tuduh di dalam kes ini dan telah mendapati melakukan satu kesalahan seperti di dalam laporan pengadu.

Hasil siasatan telah mendapati Yang Kena Tuduh telah melakukan kesalahan sepertimana di dalam pertuduhan di bawah Seksyen 411
D Kanun Keseksaan.

[5] The statement of facts was marked as P1 and the five units of handphone which formed the subject matter of the charge were produced and marked as follows:

E 1. a Nokia 2300, P2

2. a Nokia 3610, P3

3. a Nokia 3100, P4

F 4. a Samsung SGH E 800, P5, and

5. a Motorolla C-380, P6

[6] The accused admitted the facts as being true. The court
G accordingly accepted the plea of guilty by the accused and convicted him. In mitigation, the accused requested that he be imposed with a fine only. The prosecutor, on the other hand, requested for deterrent sentence as cases of this nature were rampant. The sentence was also to serve as a deterrent to the
H accused and to other like minded persons.

[7] The court sentenced the accused to three months imprisonment with effect from the date of judgment, that is, 9 January 2007. Dissatisfied with the sentence, the accused had filed, on 18 January 2007, an appeal against the sentence. On
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7 February 2007, the accused's application for stay of the custodial sentence was granted by the Magistrate, after having served 29 days in prison.

[8] The appeal by the accused was against sentence only.

The Facts Disclosed Do Not Support The Charge

[9] The accused was charged for an offence of retaining stolen property under s. 411 Penal Code, to wit, five units of handphone belonging to one Fong Chew Phein at shop known as JJ Star Trading, No. 1406, Taman Sultan Badlishah, Alor Star.

[10] According to the statement of facts, a police officer (complainant) who was on duty at Pusat Kawalan, Ibu Pejabat Daerah, Kota Setar received a phone call from one Poh Ken Hua on 19 November 2006 informing him of an armed robbery that occurred at his shop, Soji Telekomunikasi at Lorong Merpati, Alor Star. In the said armed robbery, a cash of RM100 a lap top and a handset were reported stolen.

[11] There was no mention in the statement of facts that the said Poh Ken Hua had reported a lost of five units of various brand of handphones namely, a Nokia 2300, P2; a Nokia 3610, P3; a Nokia 3100, P4; a Samsung SGH E 800, P5 and a Motorolla C-380, P6 during the aforesaid armed robbery. Neither the facts mentioned that subsequent police investigations revealed that the said handphones were identified and reported stolen in the said robbery on 19 November 2006. The need on the prosecution's part to prove one of the essential ingredient of the offence under s. 411, that is, the property is stolen property, is explained in *Ratanlal & Dhirajlal's Law of Crimes,* 25th edn at p. 2119 para 16 as follows:

> The goods received must be the identical goods which were stolen, and not some thing for which they had been sold or exchanged. The finding must be that the accused received the very property stolen, not property like it. If it is manifestly impossible to recognize the stolen property, no conviction can be made.
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> Where the stolen property consisted of cereals, the fact that the cereals found in the house of a person residing in the same village corresponded with the alleged stolen cereals was held to be no sufficient to establish the identity of the stolen cereals with those found.

[12] No evidence was led during the proceedings to show that the said handphones, P2, P3, P4 and P5 belonged to Poh Ken Hua. However the charge stated that the said handphones belonged to Fong Chew Phein. The facts made no mention in what way he or she is relevant to this case.

[13] The statement of facts too disclosed two other characters namely, Lim Kim Lee and Teoh Lai Sieng who were said to be suspects that led the police to the accused shop. There, in the presence of the accused, the handphones, P2, P3, P4 and P5 were seized together with four purchase receipts in the name of Teoh Lai Sieng and one purchase receipt in the name of Lim Kim Lee. These facts were not shown how they were relevant to the charge under s. 411 Penal Code against the accused.

[14] The third paragraph in the statement of facts is inconsistent with the charge against the accused under s. 411 of the Penal Code. The fact reads, *inter alia*, on further investigation it was revealed that the accused 'telah mendapati melakukan kesalahan seperti dalam laporan pengadu'. Upon scrutiny of the complainant's report, it was about two male Chinese armed with a knife and robbed a cash of RM100, a lap top and a handset at shop, Soji Telekomunikasi owned by Poh Ken Hua. In other words, it was a case of an armed robbery, an offence under s. 392 and s. 397 of the Penal Code. By alleging that the accused had obliquely committed the offence of armed robbery, certainly his character was put in question. He was an armed robber, person of bad character. In the Supreme Court case of *Kiew Foo Mui & Ors v. PP* [1996] 1 CLJ 14, in the course of a murder trial, the evidence that the appellants were seen fleeing from the scene of a crime in a stolen station wagon was admitted. Edgar Joseph FCJ said that this evidence – escaping in a stolen station wagon – could imply that the appellants were men of bad character and plainly inadmissible, though it was not objected to by the defence. The trial judge was duty bound to stop the prosecution from adducing it.

[15] The allegation that the accused had committed the armed robbery was also not covered by the charge. No charge under s. 392 and s. 397 of the Penal Code was preferred against him. That being the case, such allegation was inadmissible, prejudicial against the accused and ought to be excluded, though not

challenged by him. In the Court of Appeal case *Saludin Surif v. PP* [1997] 3 CLJ 529, a prosecution witness, SP12 testified that to the effect that the appellant had smoked ganja in the premises and the appellant had previously supplied the witness SP12 with ganja. The trial judge admitted the evidence on the ground that there was no challenge by the defence. Shaik Daud JCA held that the evidence of SP12 was highly prejudicial and ought to be excluded. His Lordship went on to say:

> With respect, we hold that the learned judge erred in law on this issue, as it is trite law that inadmissible evidence remains inadmissible whether challenged or not. We hold that the testimony of SP12 in connection with the appellant was highly prejudicial and ought to be excluded. The general rule is that evidence showing that the accused had committed any other offence other than those charged with, or has a disposition to commit the kind of offence charged with, is inadmissible for the purpose of showing that he had committed or likely to have committed the offence with which he was charged with.

[16] I am aware that the evidence of bad character or the evidence that the accused had committed another offence which was not covered by the charge was held inadmissible and ought to be excluded in *Kiew Foo Mui & Ors case (supra)* and *Saludin Surif* case *(supra)* respectively. It is my considered view that the said principle is equally applicable to similar objectionable evidence being adduced in the statement of facts presented to the court after the accused pleaded guilty to the charge as in the instant case. Therefore, the allegation in the third paragraph of the statement of facts that the accused had committed the armed robbery should be excluded. The learned Magistrate is duty bound to verify the facts of the case with the charge to ensure that the facts are supportive of the charge and having done so, to expunge all inadmissible, irrelevant and highly prejudicial evidence against the accused. The Magistrate must carry out the task fairly, more so in this case, the accused was unrepresented – he had not had the services of counsel at the time he entered the plea of guilty at the court below.

[17] It is axiomatic that the statement of facts should be concised and unambigous. It should containe relevant facts which go to support the elements of the charge. The facts or evidence which are irrelevant, inadmissible and gravely prejudicial to the

accused should be discarded. It is of fundamental importance to the administration of criminal justice that the accused should be given a fair trial or proceedings.

Decision Of This Court

[18] Even though the appeal was against sentence only, in the light of the above affirmities, I have decided to exercise my discretionery powers of revision under s. 325 of the Criminal Procedure Code and set aside the plea of guilty of the accused, and substitute it with a plea of not guilty. The case is hereby remitted back to the Magistrate Court (2) Alor Star for re-trial.